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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

GIANT FOOD INC., *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, GIANT FOOD INC., prays that a writ of certiorari issue to review the final decree of the United States Court of Appeals for the District of Columbia Circuit in the above-entitled cause affirming and enforcing a cease and desist order previously entered by the respondent, Federal Trade Commission, hereinafter "the Commission." The cease and desist order is reprinted herein as Appendix "A."

JURISDICTION

This Court has jurisdiction of the above-entitled cause and this petition by virtue of Section 1254(1) of Title 28 of the United States Code. The final decree of the Court of Appeals for the District of Columbia Circuit, which is reprinted herein as Appendix "B," was entered on October 14, 1963. Rehearing and/or rehearing *en banc* were denied on the same day.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is officially reported at F.2d . It is reprinted herein as Appendix "C." The opinion of the Federal Trade Commission is officially reported at FTC . The Commission's opinion and order are printed as part of the Joint Appendix at pages 73 et seq. The initial decision of the Hearing Examiner is not officially reported. The initial decision and order are printed as part of the Joint Appendix at pages 46 et seq.

QUESTIONS PRESENTED

1. Is the petitioner denied due process of law by an order of the Federal Trade Commission which fails to provide ascertainable standards for interpreting the conduct which the order proscribes, particularly where the literal proscriptions of the order apply to practices which are clearly lawful and severe penalties are prescribed for violation of the order?

2. Is the petitioner denied the hearing which the Federal Trade Commission Act specifically requires as a condition precedent to a Commission order where an order of the Federal Trade Commission exceeds the

Commission's statutory authority by prohibiting practices which are not related to or typified by the practices which were the subject of the Commission's complaint, record and decision?*

STATUTES INVOLVED

The Federal Trade Commission Act, 52 Stat. 111 (1938), as amended, hereinafter "the Act," 15 U.S.C. 41 et seq., proscribes "unfair or deceptive acts and practices in commerce." Section 5(b), 15 U.S.C.

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*In the event certiorari is granted, the following additional questions will be presented:

1. Whether the Commission's decision and order denied petitioner due process of law by reason of the fact that the decision and order are based upon hearings and a record resulting therefrom which (a) did not afford petitioner a fair, reasonable, or adequate opportunity to cross-examine witnesses produced by the Commission whose testimony was vital and material to the issues, the decision and order; and (b) did not afford petitioner an opportunity to adduce evidence which was vital and material to the issue, the decision and order;

2. Whether the acts and practices charged by the complaint and/or in which petitioner was found to be engaged constitute unfair methods of competition or unfair and deceptive acts and practices in commerce within the meaning of Section 5 of the Federal Trade Commission Act;

3. Whether the Commission's decision and order are beyond the scope of the Commission's authority and jurisdiction inasmuch as the Commission has, by its decision and order, proscribed practices which have not heretofore been defined as unfair methods of competition or as unfair and deceptive acts and practices in commerce and which are counter to the competitive antitrust policies established by the Sherman Act, 15 U.S.C. 1, and the Automobile Information Disclosure Act, 15 U.S.C. 1231;

4. Whether the Commission's Findings of Fact and Conclusions of Law are supported by substantial evidence upon the whole record.

45(b), authorizes the Commission to prevent such acts and practices and provides in pertinent part:

> "(b) Whenever . . . it shall appear to the Commission that a proceeding by it in respect [to an unfair or deceptive act or practice] would be in the interest of the public, it shall issue and serve . . . a complaint stating its charges. . . . The person [charged] . . . shall have the right to appear . . . and show cause why an order should not be entered by the Commission requiring [the person charged] to cease and desist from the violation of the law so charged in said complaint. . . ."

The Act allows any person who is subject to a cease and desist order of the Commission to obtain review of the order in a United States Court of Appeals. On review, the Court of Appeals is vested with:

> ". . . jurisdiction of the proceeding and of the questions determined therein concurrently with the Commission . . . and [has] power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. . . . To the extent that the order of the Commission is affirmed, the [reviewing] court shall thereupon issue its own order to command obedience to the terms of such order of the Commission. . . ." Section 5(c), 45 U.S.C. 45(c).

The sanction for each violation of any final order entered by the Commission is a civil penalty of $5000. Section 5(l), 15 U.S.C. 45(l). Upon certification of the facts by the Commission, the Attorney General is authorized to enforce the penalty provisions of the Act in a United States District Court. Section 16, 15

U.S.C. 56. As an alternative, the Commission may, when a United States Court of Appeals has entered "its own order" enforcing the Commission's order, enforce the Court of Appeals order in contempt proceedings in the Court of Appeals.

STATEMENT OF THE CASE

The respondent, Federal Trade Commission, entered an order in the above-entitled cause, which when enforced[1] will require the petitioner to cease and desist using the words "regular price," "mfg. list," words of similar import, or any other words descriptive of price unless the price described is either the petition's own "usual and customary" price or the "usual and customary retail selling price . . . in the trade area." (Appendix "A")

The order followed and was predicated upon a complaint, a hearing and a record which were limited exclusively to petitioner's use of the terms "regular price," and "mfg. list" in newspaper advertising of two confined lines of merchandise: kitchenwares and small electrical appliances. The complaint (J.A. 12 et seq.) alleged in pertinent part by way of example[2] that petitioner, which operates more than 50 stores in the District of Columbia, Maryland, and Virginia, advertised a "G.E. Portable Mixer," with a "Mfg. List—$19.95" for "$13.27," in one or more of the District of Columbia's major newspapers. The complaint as-

[1] Issuance of a Court of Appeals order enforcing the Commission's order has been stayed pending a decision on this petition.

[2] The complaint made similar allegations with reference to a series of kitchenwares and small electrical appliances, which it listed in Paragraph 4. At hearing, the Commission limited its proof to the articles listed in Paragraph 4 of the complaint.

serted that petitioner had, through the use of the statement "Mfg. List—$19.95" represented that the "Mfg. List" was the price at which the "G.E. Portable Mixer" was "usually and customarily sold at retail" and that purchasers of the G.E. Portable Mixer would be afforded savings equal to the difference between $19.95 and $13.27. These representations, the complaint said, were "false, misleading and deceptive" because the "mfg. list" was substantially in excess of the price at which the "G.E. Portable Mixer" was "usually and customarily sold at retail." Purchasers of the "G.E. Portable Mixer," the Commission asserted, were not "afforded savings" equal to the difference between the "mfg. list" and petitioner's advertised selling price.

Asserting that petitioner's "false, misleading and deceptive" use of the term "mfg. list" had the "capacity and tendency to mislead members of the purchasing public," the Commission's complaint charged petitioner with having engaged in "unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act."

In its answer, petitioner denied that its advertisements were "false, misleading or deceptive." (J.A. 19 et seq.) Petitioner also denied having engaged in any unfair or deceptive acts or practices or any unfair methods of competition. Petitioner asserted (J.A. 21-22), and at hearing proved (J.A. 99-104), that it had abandoned the use of the term "regular price."[3]

[3] Petitioner pledged that it would abide by the Commission's "Guides Against Deceptive Pricing" in using the term "Regular Price." The "Guides" are reprinted in Volume 3, CCH Trade Regulation Reporter, at Paragraph 7897.

At hearing, the Commission adduced testimony from several buyers employed by department store competitors of the petitioner, who testified (J.A. 115-140) that they had not advertised the "G.E. Portable Mixer" for as much as $19.95.[4] Testimony of other witnesses introduced by the Commission for the apparent purpose of proving that petitioner's use of the term "mfg. list" was false, misleading and deceptive, demonstrated only that these witnesses did not understand petitioner's use of the term "mfg. list" in its advertisements. (J.A. 141-153)

Petitioner introduced evidence (J.A. 156-171, 219-225) proving that the "G.E. Portable Mixer" had been and was being sold by several of its major competitors at "mfg. list," i.e., $19.95.[5]

The Court of Appeals affirmed the Commission's decision. The final decree (Appendix "B") of that court provides in pertinent part,

> ". . . . that the order to cease and desist [entered by the Commission] be and it hereby is affirmed, and petitioner Giant Food Inc. is hereby commanded forthwith to obey and comply with the terms of said order."

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[4] See Footnote 2: While these witnesses referred to the highest price at which they "sold," cross-examination showed that their testimony was based upon a review of advertising records. No actual sales were introduced by the Commission. Sales checks were not produced for the purpose of cross-examination despite the fact that petitioner asked for a subpoena as part of its cross-examination to obtain them. (J.A. 30-39, 127-130, 207)

[5] Petitioner introduced similar evidence with reference to most of the small electrical appliances listed in Paragraph 4 of the complaint. (J.A. 156-171, 219-225)

REASONS FOR GRANTING WRIT

1. In the present proceeding, both the Commission and the Court of Appeals failed to discharge their duty to issue an order which "at the outset [was], sufficiently clear and precise to avoid raising serious questions as to [its] meaning and application." *Federal Trade Commission* v. *Henry Broch & Co.*, 368 U.S. 360, 368, 82 S.Ct. 431, 436 (1962). Under the "generalized language" of the Commission's order, petitioner proceeds at its peril in undertaking promotional programs involving the use of any terms descriptive of price. Practices which are clearly lawful may fall within the prohibitions of the order because the vague uncertain language of the order provides no reasonable standard for determining the "usual and customary" retail selling price in an area such as Metropolitan Washington, which encompasses two fair-trade states (Maryland and Virginia) and one nationally known discount market (Washington, D. C.). The order leaves the critical question of what is (and even what is not) the "usual and customary" retail selling price of items which are fair-traded in Maryland or Virginia and "discounted" in the District of Columbia open to conjecture, surmise, and speculation. Under the order the petitioner cannot, except at the risk of a civil penalty or contempt proceeding, advertise the fair-trade price of any item which is fair-traded in Maryland or Virginia and "discounted" in the District of Columbia because it has no way of knowing whether the fair-trade price is the "usual

and customary" retail selling price in the Washington Metropolitan area.[6]

The Court of Appeals recognized the validity of petitioner's objections to the generalized nature of the order, but suggested that petitioner could resolve any questions concerning its meaning and application "by recourse to the Commission for advice." The court's suggestion offers no solution to the issues raised; to the contrary, it ignores them completely.

Proper judicial administration demands that restraining orders be clear and precise. A restraining order must be written so that the Commission, any District Court, and the Court of Appeals, as well as the petitioner, can understand its terms without reference to anyone for advice. Due process requires this.

The Commission, with the sanction of the Court of Appeals, has been offered the opportunity in this proceeding of suggesting at some later date that its order means what the Commission says it means because the Commission says so. The Court of Appeals should not be allowed to avoid its judicial obligations so simply. It should have modified the Commission's order or returned the proceeding to the Commission for an appropriate order rather than cast petitioner adrift in a sea of uncertainty when the possible

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[6] An explanation in petitioner's advertisement that the item is fair-traded in Maryland or Virginia but discounted in the District of Columbia would not assist petitioner in escaping the prohibitions of the order because "'few if any of the persons who would read [petitioner's] advertisements would take the trouble to, or did, read the fine print disclaimers.'" Opinions of both the *Examiner* and the Commission, at J.A. 53 and 82.

penalties prescribed for violation of Commission orders is so substantial.

The Commission's order is neither clear nor precise. At some later date, a District Court or the Court of Appeals may be called upon, in a civil penalty or a contempt proceeding, to decide issues which Congress has specifically entrusted to the Commission. Without defining the term "usual and customary," the order proscribes petitioner's use of the phrase "mfg. list," or "words of similar import" if the phrase or words refer to a price which is in excess of the "usual and customary" price. The order also bans any other method of "misrepresenting the usual and customary selling price." Only a later evaluation of evidence in a civil penalty or contempt proceeding is apparently sufficient to determine whether any price is in excess of the "usual and customary" price. At that time, a District Court or the Court of Appeals may also be called upon to decide whether some new but now unheard of term constitutes a "word of similar import" or a representation of a "usual and customary" price such as "mfg. list" in this proceeding. The order can only be understood on an after-the-fact, ad hoc basis, and at the risk of substantial penalties. Surely, due process contemplates more than this.

Both the Court of Appeals and the Commission insisted that the term "usual and customary," furnished petitioner a "definite guide." The Court of Appeals noted that other Courts of Appeals had "upheld orders in analogous cases where the words 'usual and customary' were used." In every case to which the Court of Appeals referred, however, the facts showed that the term "usual and customary" made reference to either a "regular price" (in which event

the term was interpreted in the context of the respondent's own past sales), or a preticketed price in an action against a preticketer (in which event the term was interpreted in the context of prices used by persons with whom the preticketer had direct business relations). The decisions in these cases have no application to the present proceeding where the petitioner has little or no knowledge of the prices at which its competitors are selling merchandise. Petitioner has no channel of communication with its competitors regarding pricing and, if it did—as it would have to, to satisfy its responsibilities under the Commission's order—the Commission would certainly accuse it of a conspiracy to fix prices.

The fact is that, in this proceeding, the Commission itself did not prove and did not even attempt to prove the "usual and customary" retail selling prices of the few kitchenwares and small electrical appliances to which it referred in its complaint. The Commission proved only that some of the petitioner's competitors had advertised[7] these kitchenwares and small electrical at less than "mfrs. list." No evidence of specific sales of these items was offered by the Commission at hearing. Rather, the Commission inferred, because three of petitioner's competitors advertised these kitchenwares and small electrical appliances at less than "mfrs. list," that the "usual and customary" retail prices were less than "list."

Thus, without any proof of any sales at less than "list" and without any showing of the size of the market for kitchenwares and small electrical appliances, either in terms of units or dollars, the Commission

[7] See footnote 4.

reached the conclusion that petitioner had misrepresented prices in violation of Section 5 of the Act.[8] The Commission rationalized its decision by stating that it had a right to insist "upon a form of advertising clear enough so that, . . . wayfaring men though they be fools shall not err therein."

Petitioner submits that, if its advertising is to be tested by the rigorous standard of the words of the Prophet Isaiah, it has a right to insist in turn that Commission orders proscribing such practices satisfy the same test.

2. The order entered by the Commission ranges far beyond the "violation[s] . . . charged in [the] complaint," and imposes a new dimension of vicarious liability for "pretic keting" by independent third parties whose practices petitioner does not, and cannot, control. The order is not "tailored," as this Court has repeatedly said Commission orders must be, to "meet the legitimate needs of the case," and "strictly to cope with the threat of future violations identical with or like or related to the violations" which petitioner was "found to have committed." *Federal Trade Commission* v. *Henry Broch & Co., supra.* See also, *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 130, 83 S.Ct. 217, 226 (1962); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167, 83 S.Ct. 239, 245 (1962); *NLRB* v. *Express Publishing Co.*, 312 U.S. 426, 435-436, 61 S.Ct. 693, 699 (1941).

Despite the fact that the allegations in the complaint and the proof in the record were limited to petitioner's

[8] Petitioner introduced evidence of actual sales at "list" by its competitors. The Commission ignored this evidence completely. Its opinion makes no mention of this evidence.

use of the terms "regular price" and "mfg. list," in newspaper advertising of kitchenwares and small electrical appliances, the order is not limited to the specific practices described in the complaint or demonstrated by the record or even like or related practices. Rather, the broad terms of the order proscribe any use of any term descriptive of price, including but not limited to the terms "regular price" and "mfg. list," in any manner, including but not limited to newspaper advertising, and in respect to any product, including but not limited to kitchenwares and small electrical appliances, unless the descriptive term refers to either the petitioner's own regular price or the "usual and customary" price in the trade area.[9]

The vice of the Commission's order is that it does too much. Clearly, it restrains the practices "charged in [the] complaint" which petitioner was "found to have committed" but in the process it also reaches and prohibits other practices which are not inherently unlawful, and which are well beyond the ambit of the activities which were the subject of the complaint and the record.

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[9] In addition to proscribing the "use" of the terms "regular price" and "mfg. list," or "words of similar import," the order broadly proscribes:

(1) ". . . otherwise misrepresenting the [petitioner's] usual and customary retail selling price . . .;

(2) ". . . otherwise misrepresenting the usual and customary retail selling price or prices . . . in the trade area;

(3) "Representing in any manner that . . . customers are afforded savings amounting to the difference between [petitioner's] stated selling price and any other price used for comparison with that selling price, unless the comparative price used represents the price at which the merchandise is usually and regularly sold by [petitioner] at retail in the recent regular course of its business."

The complaint in this proceeding, for example, did not charge petitioner with the unlawful display and sale of "preticketed" merchandise. Indeed, respective counsel for the Commission and for petitioner stipulated on the record that the complaint and record were not concerned with "preticketing."[10] Nevertheless, the literal terms of the Commission's order cover the display and sale of preticketed merchandise.[11]

The devastating impact of the Commission's order is apparent. Whenever it offers a preticketed item for sale, petitioner, risking a possible civil penalty or con-

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[10] The stipulation between counsel appears at 683-4 in the transcript and reads as follows:

> "It is stipulated by and between counsel that the manufacturer's list prices referred to in paragraph 4 of the complaint are in fact the list prices or suggested list prices which were furnished to the respondents by the manufacturers of the various products listed in the aforementioned paragraph.
>
> "It is also stipulated for purposes of this record only that none of the items mentioned in paragraph 4 were preticketed by the respective manufacturers."

[11] See footnote 9, supra, for the pertinent parts of the order; and see the Commission's proposed Guides Against Deceptive Pricing, in which the Commission states:

> "Both those who preticket merchandise that is to be sold to consumers by others and those who distribute the merchandise preticketed, as well as those who actually offer the articles for sale, are responsible if the price figures do not meet the standard set forth in this Guide. . . .
>
> "Example: A manufacturer . . . pretickets his products with his latest marked 'Price 12.95.' Although this price prevails in some areas, in others the [product] generally sells for $10.95. The preticketed price would be deceptive in any trade area where the $12.95 price is not the generally prevailing price; and the manufacturer, wholesaler, or distributor, and retailer would each be responsible for contributing to such deception." 29 Federal Register 178 (1963).

tempt proceeding,[12] must first determine and redetermine on a continuing basis whether the preticketed price is in excess of the "usual and customary" price in the trade area. If it is, petitioner is then faced with the unenviable choice of either obliterating the preticketed price, or where this is impossible, repackaging the merchandise; or, finally, where neither choice is economically feasible, discontinuing the sale of preticketed merchandise.[13] What the order does can be understood only in light of the vast number of items that are distributed on a preticketed basis.

Manufacturers of thousands of items constituting a substantial share of the merchandise which petitioner offers for sale print a suggested price directly on the container or wrapper in which they package their

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[12] In view of the fact that the order of the Court of Appeals "commands" petitioner "to obey and comply" with the terms of the Commission's order, petitioner is subject not only to the civil penalty provisions of Section 16 of the Federal Trade Commission Act, 15 U.S.C. 56, but also to a contempt proceeding in the Court of Appeals. Parenthetically, it is to be noted that there might be divers interpretations of the Commission's order, depending upon whether the Commission proceeded through the Justice Department in the District Court on a civil penalty basis or, itself, proceeded directly in a contempt proceeding in the Court of Appeals.

[13] Petitioner cannot even avoid the force of the Commission's order by selling preticketed merchandise at the preticketed price because the Commission takes the view that the manufacturer's preticketed price constitutes a representation of the usual and customary price in the trade area, and not a representation of petitioner's own usual and customary price. It follows, therefore, that by selling at the preticketed price, petitioner would simply be representing falsely, again, in the Commission's view, that it was selling the item for the price at which the item was usually and customarily sold in the trade area. Only if all the petitioner's competitors sold at the preticketed price could petitioner avoid the proscription of the order.

merchandise.[14] Typical examples of merchandise distributed on a preticketed basis range from the proverbial needle and mousetrap to automobiles[15] and include razor blades, tooth paste, shampoos, first aid material, cookies, potato chips, shoe polish, plastic adhesive tapes, crayons, coloring books, magazines, books, records, and a vast array of items which are fair-traded.[16] A more complete, but only partial, list of preticketed merchandise sold by petitioner is set forth in Appendix "D." Petitioner prices and sells the bulk of these preticketed items at less than the preticketed price. Many, but not all, of petitioner's competitors also sell at less than the preticketed price. Petitioner's offers and sales of preticketed products may, therefore, violate the literal, if not specific, terms of the Commission's order inasmuch as the preticketed prices may not be the "usual and customary" retail prices in the trade area. Customers, in terms of the Commission's

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[14] In some instances, preticketed price on a container can be covered up or removed, but in other and numerous instances, the printed price cannot be covered up or removed and the only way that the price can be removed from the public view is by repackaging.

[15] Though petitioner does not sell automobiles, automobiles must be preticketed by law. 15 USC 1231. Petitioner has consistently contended that the use of manufacturer's list price does not constitute a violation of Section 5 of the Act. If it does, then Congress legislated an "unfair method of competition" for the automobile industry in enacting the Automobile Information Disclosure Act.

[16] Maryland and Virginia, where petitioner operates some of its stores, have Fair Trade Laws. The District of Columbia, in which petitioner also operates many stores, has no Fair Trade Laws. The advertising which was the subject of the Commission's complaint was published in the Washington Post and Washington Star which are circulated in Maryland, Virginia and the District of Columbia.

order, may not be "afforded savings amounting to the difference between [petitioner's] stated selling price and [the preticketed price] used for comparison. . . ."

The practice of offering and selling preticketed merchandise does not involve, as the practices referred to in the complaint and record did involve, affirmative price representations in newspaper advertising of wide circulation. All that is involved in the offer and sale of preticketed merchandise is the display at point of sale, of items which a manufacturer has packaged in a wrapper on which the manufacturer has printed a price. Precisely because of the characteristic differences between the practices referred to in the complaint and the practice of merely offering and selling preticketed merchandise, counsel for both the Commission and the petitioner stipulated that the proceeding was not concerned with preticketing.[17]

If the petitioner had advertised preticketed items in newspapers having wide distribution and represented a preticketed price which was in excess of the "usual and customary" price in the trade area, there would be reason, and a basis in the record, for including this practice within the purview of the order. No such showing was made. There is, therefore, no basis in the record for including this practice within the literal terms of the order. And, there are compelling reasons why preticketing should be excluded from the range of the order. Petitioner has no control over the

[17] The stipulation is quoted in footnote 10. The stipulation was made to make it clear that the case did not fall within the ambit of such cases as *Baltimore Luggage* v. *Federal Trade Commission*, 296 F. 2d 608 (CA 4, 1961), which involved "preticketing," and *In the Matter of Filderman Corporation*, Docket No. 7572 (1959) which involved the use of false list prices.

advertising and packaging practices of its suppliers. Like its competitors, petitioner merely buys and sells merchandise which its suppliers offer for sale. Unlike its competitors, however, petitioner will be faced with serious administrative problems and potential financial damage, civil penalty and contempt proceedings aside, if the Commission's present order is enforced.

The order should not be allowed to stand. On the basis of a proceeding in which the Commission started out to stop allegedly unlawful and deceptive practices by the petitioner, the Commission has ended up by attacking practices of petitioner's suppliers. The unfortunate fact is that, in its effort to exercise two specific practices, allegedly deceptive, the Commission has designed an order which may halt the flow of the very commerce which the Commission is charged with protecting. The remedy may cure the evil which the Commission sought to eliminate, but it will certainly cripple, if not kill, the patient in the process.

3. The issues raised by the petition present questions of paramount importance in the administration and enforcement of the Federal Trade Commission Act. If the Commission's order is allowed to stand, retailers throughout the nation, and particularly those in the Washington Metropolitan area, may be confronted with the prospect of a "boilerplate" order by the Commission prohibiting divers methods of legitimate and lawful advertising, if they sell any pretiketed merchandise in an area where pretiketing manufacturers do not either maintain and enforce fair trade or are not permitted to enforce fair trade. This petition is, in a realistic sense, a request for a final determination of the issue presented for the benefit of a vast class of persons throughout the country.

Mindful of the admonition of this Court in *Federal Trade Commission* v. *Henry Broch & Co.*, supra, several Courts of Appeals, unlike the Court of Appeals for the District of Columbia Circuit in this proceeding, have carefully circumscribed the scope of Commission orders. The Second Circuit Court of Appeals in two recent decisions modified and limited Commission orders entered under Section 5 of the Act to the "specific practices involved" in the proceedings. *Grand Union* v. *Federal Trade Commission*, 300 F.2d 92 (C.A. 2, 1962), cert. den'd. 371 U.S. 824, 83 S.Ct. 44 (1962). The First Circuit Court of Appeals has also indicated its displeasure with the breadth of Commission orders in the course of setting aside orders in proceedings which it returned to the Commission for further findings. *Korber Hats Inc.* v. *Federal Trade Commission*, 311 F.2d 358 (C.A. 1, 1962); *Colgate-Palmolive-Peit Co.* v. *Federal Trade Commission*, 310 F.2d 89 (C.A. 1, 1962). And even before *Broch*, supra, the Fourth Circuit Court of Appeals understood the danger of expansive orders which went beyond the practices charged by the Commission in its complaints. *Asheville Tobacco Board of Trade, Inc.* v. *Federal Trade Commission*, 294 F.2d 619, 628-629 (C.A. 4, 1961). Orderly administration and enforcement of the Act requires a uniform and consistent application of provisions of the Act to everyone who is faced with a Commission complaint. Surely, retailers, such as petitioners, who engage in business in the District of Columbia, should not be made subject to more stringent orders and exposed to greater penalties than those who do business in either the First Second or Fourth Circuits.

The Commission on three different occasions has published guides against deceptive pricing practices for

the asserted purpose of serving as "practical aids to the honest businessman who seeks to conform his conduct" to the requirements of the Act. These guides are not only internally inconsistent but conflict directly with one another. In its most recent set of guides, published on January 8, 1964, the Commission completely dropped the standard of the "usual and customary" price (which is the touchstone of its order against petitioner) for a new standard which has yet to be defined. The "new guides" prompted Commissioner MacIntyre to issue a statement stating:

> "The nub of the problem as I see it is that these Guides are not, as they purport, restatements of the law; the changes introduced here are too sweeping for that. It is fair to say that the Guides in many respects are sharply at variance with the body of the law on this subject painfully built up by the Commission and courts over a number of decades. The result may well be the opposite of that intended—uncertainty for consumers, the businessman and the Commission's staff alike. . . ."

The "new guides" emphasize the necessity for a review of the order. On the one hand, the order subjects the petitioner to one standard of conduct (the "usual and customary"); all of petitioner's competitors however, are free to adhere to another standard, which remains to be defined but which appears to be less rigorous.

CONCLUSION

"The severity of possible penalties . . . for violations of [Commission] orders underlies the necessity" for an order which gives petitioner ample notice of the acts and practices will subject it to the penalties which the Act prescribes. A Commission order, no less than

a criminal statute, should be "clear and precise" so as not to raise "serious questions as to [its] meaning and application." Criminal statutes which are so vague that they leave the standard of guilt to the "varient views of the different courts and juries which may be called upon to enforce" them deny due process. *United States* v. *Cohen Grocery Co.*, 264 F. 218, 220 (E.D. Mo., 1920); aff'd. 255 U.S. 81, 41 S. Ct. 298 (1921). Statutes which are "so vague and indefinite, in form and as interpreted," as to fail "to give fair notice of what acts will be punished," transgress "an accused's rights under procedural due-process." A penal statute must set up "ascertainable standards of guilt" so that "men of common intelligence" are not "required to guess at" its "meaning." *Winters* v. *New York*, 333 U.S. 507, 509-510, 515, 68 S. Ct. 665, 667 (1948). The Commission's order, which is no less penal than a criminal statute, fails to give petitioner fair notice of the practices which it prohibits, and thereby denies petitioner due process.

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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